No. 217

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In the Supreme Court of the United States

OCTOBER TERM, 1954

RAY BRENNAN, PETITIONER

vs.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

RAY BRENNAN, PETITIONER

vs.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on May 27, 1954, reversing the judgment of the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinion of the District Court (J.A. 51-53; App. 1-3),[1] and the opinion of the Court of Appeals (App. 4-12) are not reported. Both opinions are appended to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 27,

[1]The letters "J.A.———" refer to the numbers at the sides of the pages of the Joint Appendix printed for the use of the Court of Appeals, nine copies of which have been filed with the Clerk in accordance with Rule 21.4 of the Rules of this Court. The letters "App.———" refer to the pages of the Appendix to this Petition, prepared in accordance with Rule 23.1 (i) of the Rules of this Court.

1954; a timely petition for rehearing was denied on June 18, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether a witness at a Senate Investigating Committee hearing conducted by counsel for the Committee loses the protection of 18 U.S.C. § 3486 because no member of the Committee is physically present in the hearing room during his interrogation.

STATUTE INVOLVED

18 U.S.C. § 3486 (Rev. Stat. § 859) provides:

> "No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege." See 11 Stat. 156 (1857); 12 Stat. 333 (1862); 52 Stat. 943 (1938); 62 Stat. 833 (1948).

STATEMENT

Petitioner, a reporter for the Chicago Sun-Times, was indicted December 19, 1952, charged with falsely pretending to be a federal officer in order to obtain a transcript of the testimony of one Dan Gilbert given before the Senate Special Committee to Investigate Organized Crime, in violation of 18 U.S.C. § 912 (J.A. 1). The District Court dismissed the indictment on the ground that the evidence connecting petitioner with the offense charged was privileged against use in a criminal proceeding by virtue of 18 U.S.C. § 3486 (J.A. 6, 7, 60-80).

The disputed evidence consists of the stenographic transcript of the interrogation of petitioner and two other witnesses by counsel to the Senate Committee on November 16,

1950 in the Committee chamber (J.A. 10-11). This evidence was introduced in the District Court by the Government in the form of an exhibit to a motion for a rehearing of the order dismissing the indictment (J.A. 8, 10-50). Admittedly the Government will be unable to prove the charge made in the indictment without this evidence (J.A. 71-73; App. 5).

The circumstances under which this testimony was taken are shown by the transcript as follows: A few days before the hearing, Mr. John L. Burling, assistant counsel to the Senate Committee, telephoned the late Mr. Paul M. Godehn, who was then the attorney for petitioner and for the Chicago Sun-Times, and requested that the petitioner and the editor of the Sun-Times be produced in Washington for examination (J.A. 10, 12). Mr. Burling represented that he had authority to act on behalf of the Committee. He stated "... that the Committee, acting through me, would like to see you and ask some questions about the facts." (J.A. 12). Pursuant to this request, petitioner, the executive editor, and the publisher of the Chicago Sun-Times, accompanied by their counsel, appeared in the committee room and submitted themselves for examination (J.A. 10).

At the opening of the hearing counsel for the petitioner stated his claim that the transcript of the examination would be privileged (J.A. 10-15). He did not assert that the giving of testimony would create a bar to subsequent proceedings. He merely wanted the record to show that the testimony was given under a claim that "this transcript this afternoon should not be used in subsequent proceedings as proof. If there is to be any subsequent proceeding, then the proof should be adduced in the usual manner without use of this transcript." (J.A. 12).

One of the witnesses then asked "to have it clearly established that this transcript is not going to be used against us in a subsequent proceeding" (J.A. 12). Counsel for the Committee disclaimed authority to give the witnesses any such assurance. After making it clear that they would not

want to testify without some assurance that the transcript would not be used against them (J.A. 13), and after getting such advice from their counsel (J.A. 14-15), though not from Committee counsel, the witnesses agreed "to cooperate with the Senate Committee" and "to proceed with the taking of testimony" on the express assumption that their claim of privilege would be recognized in any subsequent proceeding (J.A. 14-15).

The three witnesses were then examined by Committee counsel (J.A. 15, 34, 45), and cross-examined by their own counsel (J.A. 32, 44). Counsel objected to the form and propriety of certain questions (see e.g. J.A. 31, 40, 49). The November 2, 1950 issue of the Sun-Times was identified as an exhibit to the executive editor's testimony (J.A. 44). The transcript contains a candid description of all the facts which the Senate Committee, acting through its counsel, was seeking to obtain from these three witnesses.

After considering the transcript, and hearing full argument, the District Court overruled the Government's motion for rehearing. It found that:

> "The individuals, before whom the testimony herein involved was given by Defendant, were authorized representatives of the Senate Committee, sitting for the purposes of taking evidence or securing oral statements from witnesses pertaining to the subject-matter which the Committee was created by the Senate to explore. They constituted an arm of the Committee and acted for and on behalf of it." (J.A. 52; App. 2).

After making this finding, the Court concluded that "the testimony given by [petitioner], in the circumstances, comes within the definition of testimony referred to in § 3486 as 'testimony given by a witness before * * * any Committee of either House.' To hold otherwise, in the Court's judgment, would be to subvert the useful purpose of the immunity statute." (J.A. 52-53, App. 2-3).

The Court of Appeals, without questioning the Trial Court's findings, reversed, holding, first, that petitioner did

not in a literal sense make his statements "before any Committee"[1] and second, that his testimony was not within the purpose of § 3486 because it was not given under compulsion. The Court indicated that compulsion would not have been necessary if a member of the Committee had been present during the hearing.[2]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding that petitioner's testimony given before a Senate Committee acting through its counsel is not within the protection of 18 U.S.C. § 3486.

(2) In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

(1) Congress has adopted few measures for the protection of witnesses appearing before its committees. As the activity of these committees expands, the significance of a protective statute like § 3486 increases. For this reason, this Court has recognized that "a proper understanding of the scope of this Section is of importance to the national government, to the states and to witnesses summoned before congressional committees." *Adams* v. *Maryland*, 347 U.S. 179, 180 (1954). The important question presented here as to the scope of § 3486 has not been, but should be, settled by this Court.

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[1] The Court of Appeals summarized its first point in the metaphorical statement that although "Committee counsel was acting as an arm of the Committee, . . . he was not an organic part of the Committee which can be composed only of members of Congress." (App. 7-8).

[2] The Court of Appeals did not attach significance to the fact that petitioner was not sworn. Since testimony before congressional committees is normally not given under oath, and since § 3486, which applies only to legislative hearings, unlike comparable statutory provisions applicable to judicial and quasi-judicial hearings, contains no requirement of an oath, petitioner was obviously giving "testimony" within the meaning of the statute.

(2) The Court of Appeals misconceived the purpose and effect of § 3486.

Section 3486 is to be sharply contrasted with immunity statutes such as the Compulsory Testimony Act of 1893.[4] Instead of granting the witness in a congressional inquiry a complete immunity from prosecution for any crime described in his testimony, as does the Compulsory Testimony Act, this statute merely prohibits the future use of that testimony in criminal proceedings. It offers no sanctuary to criminals.[5] Admissions to Congress, like admissions to a lawyer or cleric, are privileged against use as evidence, but are no bar to prosecution based on independent admissible proof.

Petitioner could not have been compelled, either by Congress, by the Senate, or by a Senate Committee acting through its staff, to testify against himself. Since § 3486 does not grant a witness complete immunity from prosecution, it does not enable Congress to compel a reluctant witness to give self-incriminating testimony. *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). Section 3486 performs the more limited function of encouraging witnesses to cooperate with Congress by relieving them of the risk that their testimony might later be used against them. See *Adams* v. *Maryland*, 347 U.S. 179, 182-183, and concurring opinion at 184-185 (1954).

Since § 3486 is designed to encourage cooperation with Congress, it should not be construed to penalize the co-

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[4] 27 Stat. 443, 49 U.S.C. § 46. See *Smith* v. *United States*, 337 U.S. 137, 141 (1949).

[5] There is absolutely no danger that the giving of testimony under the protection of this statute will benefit criminals. After the witness testifies, the prosecution will have the same amount of available, admissible evidence against him as if he had never testified at all. The effect of the statutory *privilege* of § 3486 is thus entirely different from the effect of the statutory *immunity* discussed in *United States* v. *Monia*, 317 U.S. 424, 428-429 (1943).

operative witness. Petitioner may well have had a right to insist on the physical presence of a member, and perhaps even a quorum of the Senate Committee before testifying.[4] But his willingness to forego that right and give the Committee the information it was seeking at the time and place requested by the Committee, and in the type of proceeding most convenient to the Committee, should certainly not result in the waiver of his statutory privilege—especially when he expressly claimed the protection of the statute. If there was any waiver by petitioner, as the Court of Appeals has in effect held, the waiver was certainly unintentional.

The construction of § 3486 adopted by the Court of Appeals makes the Act a trap for the unwary. The effect of the decision is to make the witness's protection dependent on the physical presence of either a quorum or at least a member of the Committee. Thus, witnesses would frequently lose the benefit of § 3486 by the temporary absence of a member on urgent business; even during one-member committee hearings, it is not uncommon for the member to leave the room temporarily while committee counsel continues the interrogation. In such event the unwary witness would lose the statutory protection at the very moment when he most needed it. Star Chamber proceedings should not be encouraged by a statute for the protection of witnesses.

The failure of the Court of Appeals to give due regard to the difference between a statute like the Compulsory Testimony Act, which grants the witness complete immunity from prosecution "for or on account of any trans-

[4] *Cf. United States* v. *Bryan*, 339 U.S. 323, 332, n. 8 (1950). The question whether a congressional committee can compel a witness to testify without a quorum present is not directly presented by this case. Petitioner here did so testify, as a result of the telephoned summons which subjected him to a realistic form of compulsion. He "volunteered no spontaneous outpouring of testimony," and clearly was not a volunteer in the hypothetical sense suggested in the opinion in *Adams* v. *Maryland*. See 347 U.S. 179, 180-181 (1954).

action, matter or thing, concerning which he may testify",[7] and 18 U.S.C. § 3486, which merely "provides that no testimony given by a witness in congressional inquiries 'shall be used as evidence in any criminal proceeding against him' ",[8] appears, in large part, to have motivated the decision below. The Court of Appeals referred to petitioner's position as a claim of "immunity from prosecution" (App. 6, 9-10) and expressed fear that the construction of § 3486 urged by petitioner would create "the danger of undue interference with the enforcement of the criminal laws through enlarging the consequences of staff action" (App. 11-12). Since the Court's fear was completely unfounded in view of the fact that § 3486 confers no immunity from prosecution,[9] it seems clear that the Court of Appeals misconceived the limited function of the statute.

(3) The rationale of the decision of the Court of Appeals has been rejected by this Court.

The Court of Appeals held that the statute should be confined to its narrowest meaning because the original purpose of Congress to compel incriminating testimony was frustrated by the decision in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892) (App. 9-10 and *passim*). Precisely the same reasoning was rejected by this Court in *Adams* v. *Maryland*, 347 U.S. 179, 182-183 (1954).[10]

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[7] 27 Stat. 443 (1893), 49 U.S.C. § 46.

[8] *Adams* v. *Maryland*, 347 U.S. 179, 180 (1954).

[9] The fear expressed by the Court of Appeals is relevant under statutes like the Compulsory Testimony Act which grant total immunity from prosecution. But even there this fear is not controlling. The authority to confer immunity from prosecution may be delegated to employees of regulatory agencies. See e.g. *Smith* v. *United States*, 337 U.S. 137 (1949).

[10] Previously the Court had departed from the literal text of § 3486 to avoid an "absurd conclusion." *United States* v. *Bryan*, 339 U.S. 323, 335-343 (1950). The Court there refused to permit a literal reading of the Act which would have protected the contumacious witness; it should now refuse to permit a reading which penalizes the cooperative witness.

Having rejected the argument for reading § 3486 as narrowly as possible, this Court cannot appropriately permit the decision of the Court of Appeals in the instant case to stand. Under a fair construction of its language the statute applies to petitioner's testimony. A deposition taken by Committee counsel on behalf of the Committee, and transcribed for the purpose of submission to the Committee, should certainly be considered testimony "before" the Committee. The Trial Court expressly found that Committee Counsel were authorized to act for and on behalf of the Committee for the purpose of obtaining petitioner's testimony.

CONCLUSION

Section 3486 affords a limited protection to witnesses before congressional committees. In view of the limited character of this protection, there are no substantial policy reasons supporting the construction of the Act adopted by the Court of Appeals. The contrary construction is supported by a fair reading of the statutory language, by the sound policy of discouraging habitual reliance by prosecutors on the defendant's own testimony as the sole source of proof, and by the obvious desirability of encouraging witnesses to cooperate with congressional committees.

It is respectfully submitted that the question presented by this case merits the attention of this Court and that a writ of certiorari should issue.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES *vs* RAY BRENNAN	Criminal Case No. 1816-52

Memorandum and order

The Government has filed motion for rehearing of Defendant's motion to dismiss the indictment, which latter motion was heard and granted by the Court on January 23, 1953.

The ground relied on by the Government in connection with its motion for rehearing is that the immunity claimed by the Defendant does not fall within the purview of the language of the immunity statute, to wit Section 3486, Title 18, U. S. Code, for the reasons that when Defendant gave the testimony, in connection with which the question of immunity arises, he was not sworn as a witness and did not testify under oath; that he did not appear and testify pursuant to a subpoena; and that he did not give testimony as a witness before a Committee of either House of Congress within the terms and meaning of the immunity statute. In argument the further suggestion was made that the Defendant may not claim immunity because no effectual claim of immunity was made by Defendant prior to or at the time of the making of his statements as to which immunity is claimed, and that no specific immunity was granted to him by the Government in connection therewith.

The Court, after having heard the oral arguments of counsel and after having read briefs filed on behalf of both parties, and having considered the authorities cited therein adheres to its ruling sustaining the motion of the Defendant to dismiss the indictment for the reasons stated by the Court in sustaining said motion.

The Court is not persuaded that either an oath or subpoena is necessary to cause testimony of the character contemplated by Section 3486 to be included within the ambit of the immunity safeguard. *U. S.* v. *Armour,* 142 Fed. 808, 822 (1906); *Sinclair* v. *United States,* 279 U. S. 263 (1929); *Wigmore on Evidence, 3rd Edition,* 1940, 508, 519. Nor is it necessary, in order to make the protection of the statute applicable, that immunity be claimed by the witness. Said protection attaches as a result of the grant contained in the statute. *U. S.* v. *Monia,* 317 U. S. 424 (1943); *U. S.* v. *Armour, supra.*

The individuals, before whom the testimony herein involved was given by Defendant, were authorized representatives of the Senate Committee, sitting for the purposes of taking evidence or securing oral statements from witnesses pertaining to the subject matter which the Committee was created by the Senate to explore. They constituted an arm of the Committee and acted for and on behalf of it. The Defendant testified freely and voluntarily after having asserted and claimed immunity under the statute. The fact that immunity was not specifically granted is, in the Court's judgment, immaterial since such immunity was granted by the statute and, indeed, the individuals purporting to withhold the granting of immunity, while acting cautiously, had no power either to withhold or grant immunity, nor, as aforestated was Defendant required to assert or claim it. In the Court's opinion the testimony given by the Defendant, in the circumstances, comes within the definition of testimony referred to in Section 3486 as "testimony given by a witness before * * * any committee of either House." To hold otherwise, in the Court's judgment, would be to subvert the useful purpose of

the immunity statute. *U. S.* v. *Bryan*, 339 U. S. 323 (1950).

Accordingly, the motion of the Government for Rehearing of Defendant's Motion to Dismiss is overruled.

CHARLES F. MCLAUGHLIN,
Judge.

MARCH 23, 1953.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11805

UNITED STATES OF AMERICA, APPELLANT

v.

RAY BRENNAN, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided May 27, 1954

Mr. John D. Lane, Assistant United States Attorney, with whom *Messrs. Leo A. Rover,* United States Attorney, and *Lewis A. Carroll* and *Frederick G. Smithson,* Assistant United States Attorneys, were on the brief, for appellant. *Messrs. William J. Peck* and *William R. Glendon,* Assistant United States Attorneys at the time the record was filed, also entered appearances for appellant.

Mr. George B. Young, of the bar of the Supreme Court of Illinois, *pro hac vice,* by special leave of Court, with whom *Mr. Thomas V. Lefevre* was on the brief, for appellee.

Before CLARK, FAHY and DANAHER, Circuit Judges.

FAHY, *Circuit Judge:* Ray Brennan, the appellee, was indicted under 18 U.S.C. § 912 (Supp. 1952), set forth in the margin.[1]

Appellee filed a motion to dismiss, in the course of argument of which the Government advised the District Court that the only evidence it could adduce to support the indictment consisted of unsworn statements made by Brennan before members of the staff of the Senate Special Committee to Investigate Organized Crime in Interstate Commerce. The court held that the use of this evidence was prohibited by 18 U.S.C. § 3486 (Supp. 1952), which reads:

> "No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

The court entered its order granting the motion, and thereafter overruled the Government's motion for rehearing. The United States appeals, as authorized by 18 U.S.C. § 3731 (Supp. 1952).[2]

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[1] "Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

[2] See, also, § 23-105, D.C. Code (1951); *United States* v. *Cefaratti*, 91 U.S. App. D.C. 297, 202 F. 2d 13, *cert. denied*, 345 U.S. 907.

In earlier proceedings appellee moved to dismiss the appeal as constituting double jeopardy. We denied that motion since the question of double jeopardy would be open for consideration, if necessary, should further proceedings be had

The circumstances of the making of the statements are not in dispute. The Committee itself at an executive session in Chicago had received testimony from Dan Gilbert, a candidate for the office of Sheriff of Cook County, Illinois. Without the Committee's consent, Brennan, a reporter for the Chicago Sun Times, obtained a transcript of this testimony from the reporting company in Washington. He took it to officials of the Sun Times who published a substantial part of it.

Brennan was suspected of having obtained the transcript by pretending to be an officer or employee acting under the authority of the United States in violation of 18 U.S.C. § 912 (Supp. 1952), n. 1 *supra*. One of Committee counsel, John L. Burling, telephoned from Washington to counsel for the Sun Times in Chicago.[3] As a result, Brennan came to the office of the Committee in Washington on November 16, 1950, accompanied by Marshall Field, Jr., the newspaper's publisher and editor, Milburn Akers, its executive editor, and counsel. Expressing willingness to have the participants tell Burling what had occurred, their counsel claimed on their behalf immunity from prosecution based upon any questions which might be put or answers which might be given. He did not admit violation of any law or the commission of contempt of the Senate or of its Committee, nor did he claim any right on the part of his clients to refuse to answer under the protection accorded against self-incrimination by the Fifth Amendment. The

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in the District Court. In the meantime we think a justiciable controversy exists over reinstatement of the indictment, turning upon the application of 18 U.S.C. § 3486 (Supp. 1952).

[3] The transcript of the conference discloses counsel said: "[Mr. Burling] advised me he wanted to examine the reporter, Mr. Brennan, and also the editor who was responsible for making the decision to publish the testimony * * * and I agreed * * * I would produce * * * the three parties * * *."

claim advanced was simply that what they might say could not be used as evidence against them in any criminal proceeding. Burling on his part made it clear that in his opinion he had no authority or capacity to confer immunity. He did say he had authority to make the telephone request which had brought the gentlemen to Washington and, also, "that the Committee, acting through me, would like to see you and ask some questions about the facts"; but, he added, if it should be decided that the crime of impersonating a Federal officer had been committed there was nothing he knew of that an employee of a Senate committee could do to grant immunity.[4]

With the matter in this status Brennan told in detail and apparently without reserve the manner in which he had obtained the transcript of Gilbert's testimony.[5] In considering whether Brennan's statements thus made and transcribed were unavailable, by reason of 18 U.S.C. § 3486, *supra*, as evidence against him in the subsequent criminal proceeding, we assume they were made at the request of Committee counsel acting within the scope of his authority.

It is apparent that Brennan did not in a literal sense make his statements "before any committee". Though Committee counsel was acting as an arm of the Committee, this is so only in the sense that he was an agent and

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[4] This position was maintained throughout and was confirmed by General Counsel of the Committee, in a long distance telephone conversation with Burling and counsel for Brennan.

[5] The transcript of the conference indicates that Brennan represented that he was the new office manager for the Kefauver Committee, that he had received a telegram from Senator Wiley requesting a transcript of testimony given by Gilbert, and then pretended to read to the representative of the official reporters a non-existent telegram; upon these and similar representations he was permitted to take the transcript marked "Executive Session—Confidential" which in substance was later printed in the newspaper by which Brennan was employed.

employee of the Committee; he was not an organic part of the Committee which can be composed only of members of Congress. The statute does not in terms apply to statements given to agents or employees of a committee. It is well established, however, that a meaning not conveyed by the literal language may be given in order to carry out the legislative intention, if the words used will bear such meaning. *Johansen* v. *United States*, 343 U.S. 427, 431; *United States* v. *Bryan*, 339 U.S. 323, 338. While we think the language here would bear a meaning beyond the literal no adequate basis appears for concluding Congress intended to immunize statements made in the circumstances presented. Obviously Congress requires, in the performance of its investigative activities, the assistance of personnel who are not members. But the testimony it has insulated from use in subsequent criminal proceedings is not all testimony obtained by investigation. It is that which is given "before any committee". Broader terms were readily available to include statements voluntarily made to committee counsel if these also were intended to be immunized, assuming *arguendo* that such statements would be "testimony".

In *United States* v. *Bryan, supra*, the history of 18 U.S.C. § 3486 was reviewed in determining whether it should be construed to preclude the use of certain testimony, admittedly given "before" a committee, in a subsequent trial for contempt under Rev. Stat. § 102, as amended, 52 Stat. 942, 2 U.S.C. § 192. The Court departed from the literal language of the statute to hold the immunity not applicable; but the testimony, though before the Committee, was part of the conduct charged to constitute contempt. To have adhered to the literal language would have led to a result thought clearly unintended by Congress. Here we think the result intended does not call for interpreting the language of the statute to include what occurred. Neither the history, language, nor purpose of the statute indicates an intention to immunize such statements voluntarily made to counsel for the Committee.

Earlier texts in the evolution of the statute are invoked by appellee in support of his position. These are relevant. *United States* v. *Bryan, supra* at 337-8. The progenitor of the present statute is the Act of January 24, 1857, 11 Stat. 155. It was amended by Act of January 24, 1862, 12 Stat. 333, again in 1874, Rev. Stat. § 859, and in 1938, 52 Stat. 943, and codified in the United States Code in 1948 as 18 U.S.C. § 3486. The terms of the original statute make clear that the immunity was part of a legislative plan to protect persons from the use in criminal proceedings of information divulged under compulsion exerted by other provisions of the statute, including that making it a misdemeanor for one wilfully to default if summoned as a witness "by the authority" of either House to give testimony or to produce papers upon any matter before either House or any committee of either House.

As pointed out in *United States* v. *Bryan, supra* at 335, the function of the statute was,

> "* * * to provide an immunity in subsequent criminal proceedings to witnesses before congressional committees, in return for which it was thought that witnesses could be compelled to give self-incriminating testimony. * * *"[4]

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[4] The Court continued,

> "* * * That purpose was effectively nullified in 1892 by this Court's decision in *Counselman* v. *Hitchcock*, 142 U.S. 547, holding that R.S. § 860, a statute identical in all material respects with R.S. § 859, was not a sufficient substitute for the constitutional privilege of refusing to answer self-incriminating questions. Under that decision, a witness who is offered only the partial protection of a statute such as §§ 859 and 860—that his testimony may not be used against him in subsequent criminal proceedings—rather than complete immunity from prosecution for any act concerning which he testifies may claim his privilege and remain silent with impunity.
>
> "Section 860 was ultimately repealed. * * * But the attention of Congress has not, apparently, been called to the anomaly presented by the continued existence of

The footnotes accompanying the Supreme Court opinion (339 U.S. at 335-7) give additional historical details tending to show the purpose to compel the giving of testimony which could not be obtained, because of the Fifth Amendment, unless immunity were granted. This purpose we think would not be served by extension of the immunity to the Brennan statements, for they were given neither under compulsion nor before the Committee. We do not imply that had they been made before the Committee itself the immunity would not apply unless they were also made under compulsion. But when given before the staff without compulsion neither the terms nor the purpose of the statute are met.

We have assumed Burling was acting on behalf of and with the authority of the Committee in seeking information; but the authority in this instance was to obtain cooperation, not to compel. We know of no basis for thinking that a refusal by Brennan to give the information sought by counsel for the Committee would have been contumacious or would have subjected him to prosecution.

Another aspect of *United States* v. *Bryan, supra,* is relied upon by Brennan. It was held in that case that contempt of Congress was committed by Bryan notwithstanding the absence of proof that a quorum of the committee was present when she made her unresponsive return to a subpoena.[7] It is urged in substance that if a quorum of a committee need not be shown in order to convict of contempt, then no committee at all need be

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R.S. § 859, which, like § 860, was a constituent part of an immunity 'bargain' declared invalid in the *Counselman* case. The courts must, therefore, give effect to the statute. * * *" (339 U.S. at 335-7)

[7] In *Christoffel* v. *United States,* 338 U.S. 84, the presence of a quorum had been held essential to the competency of the tribunal, the committee, before whom the perjury there involved was alleged to have been committed.

shown to bring within the immunity a statement given to its counsel for the committee's use. But the statutes governing contempt do not specify that the conduct must be before the committee. The essence of contempt, as explained in *United States* v. *Bryan, supra,* is conduct contumacious of authority validly exercised. Furthermore, the Court pointed out that if one desired to defend against the charge of contempt on the ground of defective composition of the committee before which the alleged contempt is manifested, assuming as the Court did that the subpoena required the production of papers before the Committee *qua* committee, then objection on this ground comes too late if not made when the alleged defect in composition could be remedied. Members were present when the default occurred but no question was then raised that Bryan was unable to comply with the subpoena because of the absence of a quorum.

We do not read *United States* v. *Armour & Co.,* 142 Fed. 808 (N.D. Ill.), also relied upon by appellee, as helpful to his case. The decision insofar as here pertinent was that records and testimony were within the immunity statutes there applicable[4] notwithstanding the records were produced, and testimony was given, without a formal summons or subpoena and notwithstanding the testimony was not under oath. But the evidence was before the requisite agency, the very question here in controversy. We do not intimate that if Brennan's statements had actually been given before the Committee the absence of a summons or subpoena, or oath, would render the immunity inapplicable.

Arguments from policy, as they might aid in determining the legislative intention, are conflicting. Greater facility in obtaining information which might result from extending the immunity to cover these statements runs into the danger of undue interference with the enforcement of

[4] 32 Stat. 828, 904; 27 Stat. 443.

the criminal laws through enlarging the consequences of staff action.[9] We think a matter so close to the actual processes of Congress itself should be left by the courts for Congressional clarification if a staff is to be put on a par with a committee in such circumstances.

Our decision that the evidence was available to the Government notwithstanding 18 U.S.C. § 3486 (Supp. 1952) is limited to the facts of this case. There might be situations, of compulsion or otherwise, which would bring statements not made in the presence of a committee, or of a committee quorum, within the scope of the immunity because within the intendment of the statute conferring it. We do not think this is such a case, and lay down no rule to govern situations not before us.

Reversed and remanded for further proceedings not inconsistent with this opinion.

[9] The recent decision of the Supreme Court in *Adams* v. *Maryland*, 347 U.S. 179, has no bearing upon the question now before us. It involved no issue with respect to whether the testimony sought to be used in the state court was given before a committee of Congress.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 217

RAY BRENNAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 63-71) is not yet reported. The memorandum opinion of the District Court (R. 35-36) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1954 (R. 75), and a petition for rehearing (R. 76-87) was denied on June 18, 1954 (R. 92). The petition for a writ of certiorari was filed on July 15, 1954. The jurisdiction of

this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether petitioner's voluntary statements before an assistant counsel to a Senate investigating committee, who stated that he could not confer immunity from prosecution, constituted testimony before a Senate committee which became inadmissable in a criminal prosecution under 18 U.S.C. 3486.

STATUTE INVOLVED

18 U. S. C. [1952 Ed.] 3486, 62 Stat. 833 provides:

> No testimony given by a witness before either House, or before any commi... either House, or before any joint co... established by a joint or concurrent re... of the two Houses of Congress, shall ... as evidence in any criminal proceeding ... him in any court, except in a prosecu... perjury committed in giving such te... But an official paper or record pro... him is not within the said privilege.

STATEMENT

Petitioner, a reporter for the Chicag... Times, was indicted in two counts in the ... States District Court for the District of Colu... for violations of 18 U.S.C. 912 for falsely im... sonating a federal officer in order to obtain a t... script of the testimony of one Gilbert before the

Senate Special Committee to Investigate Organized Crime in Interstate Commerce (R. 5-6). In connection with petitioner's motion to dismiss, the Government admitted that it could not prove its case without relying upon a transcript of statements made by petitioner on November 16, 1950, in Washington, D. C., before an assistant counsel to the Senate Committee (R. 8-35, 43-44). The District Court dismissed the indictment and overruled the Government's motion for rehearing on the ground that petitioner's answers to the counsel's questions were inadmissible under 18 U.S.C. 3486, *supra*, p. 2 (R. 7, 35-36). The Court of Appeals reversed, holding that petitioner had not made his statements "before any committee" under 18 U.S.C. 3486 and that they were not within the purpose of the statute since not given under compulsion (R. 63-71).

The circumstances surrounding the making of the statements were as follows:

[illegible] petitioner had been suspected of obtaining [illegible]lbert transcript in violation of 18 U.S.C. [illegible]rohibiting false impersonation of a federal [illegible]), assistant committee counsel Burling [illegible]d attorney Godehn, counsel for the Chicago [illegible]imes, to ask that he produce for examination [illegible]tioner, Marshall Field, Jr., the editor and pub[illegible], and Milburn P. Akers, the executive editor. November 16, 1950, Godehn and the three newspapermen came to Washington, D. C., before [illegible]rling and another assistant counsel named [illegible]in, and announced that they were making "vol-

untary appearances." Godehn asserted, on behalf of the newspaper and the three individuals, a privilege of immunity from prosecution based upon any questions which might be asked or answers given. In presenting this immunity claim, Godehn stated he was making no admission that the newspaper had violated any federal law, or had done anything in contempt of the Senate of its Committee. (R. 8-9.)

Burling then stated (before any testimony was given) (R. 9): "I have no authority or capacity to confer immunity upon anyone * * * I do not have any understanding with you whatever regarding immunity because I do not believe that, even if I wanted to, I could possibly confer any immunity on anyone." After Godehn reiterated the immunity claim, the following occurred (R. 9):

> Mr. Burling: If the record is satisfactory now from your standpoint, it is satisfactory from mine provided it shows that I haven't said anything to you with respect to immunity except that I don't think I can confer it.
>
> Mr. Godehn: In other words, my position is this: I think this transcript this afternoon should not be used in subsequent proceedings as proof. If there is to be any subsequent proceeding, then the proof should be adduced in the usual manner without use of this transcript.

When Field stated that if Burling had the authority to summon the parties, it would seem

that he would have authority to take a stand on the immunity issue, Burling replied (R. 9-10): "No. I have authority to telephone to your attorney and tell you, that is, tell him, that the Committee, acting through me, would like to see you and ask some questions about the facts. But, for example, if the Attorney General should decide the crime of impersonating a Federal officer had been committed, there is nothing that I know of which an employee of a Senate committee can do to grant the proposed defendant immunity."

Replying to Field's suggestion that during a recess Burling should phone the chairman of the Committee, then holding hearings in Los Angeles, to determine "under what circumstances we are testifying here," Burling stated, "You are not testifying at all" (R. 10). Although the chairman himself was not contacted, during a recess a three-way telephone conversation was held between Mr. Halley, the chief counsel for the Committee in Los Angeles, Godehn and Burling, with Halley also stating that no immunity could be conferred (R. 11).

Upon resumption of the "informal meeting", Burling related the telephone conversation and concluded: "I have no objection whatever to your putting any claim or legal statement concerning immunity on the record, but I do not think I can, and I do not, give you any assurance with respect thereto" (R. 11). Godehn stated: "Notwithstanding the opinion of Mr. Halley and Mr. Burling as to their lack of power, we have decided to pro-

ceed with the taking of testimony, but we reassert the claim of immunity previously made, and the testimony *will be given* with the belief on our part that our claim of immunity will be recognized in the event of any subsequent proceeding, even in the absence of any assurance by counsel that it will be so recognized." (R. 11; emphasis added.)

After these colloquies, petitioner, Field, and Akers answered questions by assistant counsel for the Committee (R. 11-35). Petitioner related how he obtained the Gilbert transcript from the shorthand reporter by representing that he was Mr. Whitney, the new office manager for the Kefauver Committee, and purporting to read from a fictitious telegram by Senator Wiley requesting a transcript of Gilbert's testimony (R. 13-17).

ARGUMENT

The court below was correct in ruling that petitioner's statements before an assistant counsel for the Senate Committee were not testimony "before any committee of either House" so as to be inadmissible under 18 U.S.C. 3486, *supra*, p. 2. Petitioner made his statements—not before the Committee or any of its members at a hearing—but before assistant counsel Burling and Klein at an "informal meeting" or conference (R. 8, 11), at which Burling stated the parties were "not testifying at all" (R. 10). Manifestly, only Senate members could constitute the Committee, even though Burling and Klein were admittedly acting on its behalf in seeking the information desired.

This Court has held that testimony before a lesser number of members of a congressional committee than is necessary to constitute a quorum under the governing rules of the appropriate house of Congress is not testimony before a "competent tribunal" within the terms of the perjury statute. *Christoffel* v. *United States,* 338 U.S. 84. By a parity of reasoning, testimony before persons who are not even members of Congress cannot constitute testimony before a committee within the terms of 18 U.S.C. 3486.

There is no reason in this case—where petitioner insisted on testifying although told immunity would not be available—to read additions into the explicit language of the statute. The history of the present 18 U.S.C. 3486 is fully set out in *United States* v. *Bryan,* 339 U.S. 323, 335-338. In speaking of the purpose of the statute [then R.S. § 859], this Court stated that the legislative purpose was to compel testimony which would not otherwise be voluntarily given (339 U.S. at 338):

> That purpose was "more effectually to enforce the Attendance of Witnesses * * * and to compel them to discover Testimony." It had been the experience of Congress prior to 1857 that witnesses could not be compelled to disclose desired information, in part because of insufficient penalties for nondisclosure, and in part because of the constitutional privilege against self-incrimination. In an attempt to surmount the latter obstacle, Congress enacted what became R.S. § 859. By granting an im-

> munity, it was the congressional intent to compel testimony which had hitherto been unavailable.

The fact that 18 U.S.C. 3486 does not provide complete immunity, as do the Compulsory Testimony Act of 1893, 27 Stat. 443, and other similar statutes, does not alter the fact that the purpose of the statute was to give a *quid pro quo for* compulsion.

Petitioner argues that in *Adams* v. *Maryland,* 347 U.S. 179, 182-183, this Court refused to construe the statute narrowly even though it recognized that the original purpose had been frustrated by the holding in *Counselman* v. *Hitchcock,* 142 U.S. 547. But the fact that this Court refused to read an exception into the literal language of the statute in the *Adams* case does not require that in this case the court add to the coverage of the statute a situation which falls neither within its language nor its intendment.[1]

Petitioner's assertion (see fn. 6, Pet. 7) that he was subjected to a realistic form of compulsion when he testified as a result of the telephone summons is not supported by the record. He was under no legal compulsion by subpoena to come to Washington, and his counsel announced that his appear-

---

[1] It is true that in *United States* v. *Bryan,* 339 U.S. 323, this Court refused to read what is now 18 U.S.C. 3486 literally. This was necessary so that the congressional purpose would not be subverted, since Bryan's testimony, though given before the Committee, was part of the conduct charged to constitute the contempt for which she was being tried.

ance was voluntary. The record is clear that the efforts of petitioner's counsel to have Burling or one of his superiors recognize the validity of the asserted immunity were of no avail. *Supra,* pp. 3-6. Quite clearly, this is not a case where a government employee tricked petitioner into believing his statements would be inadmissible. Petitioner voluntarily chose to make the statements before counsel. There is no valid policy reason for prohibiting the Government from using petitioner's voluntary incriminating statements against him in a trial to secure his conviction. Such a voluntary disclosure may properly lead to a conviction, in the same manner as the ordinary voluntary plea of guilty, confession, or admission against interest.

Furthermore, the limited special situation here involved renders this an inappropriate case for certiorari. The court below expressly held that its decision was "limited to the facts of this case," while conceiving of, but expressing no opinion as to other "situations, of compulsion or otherwise, which would bring statements not made in the presence of a committee, or of a committee quorum, within the scope of the immunity because within the intendment of the statute conferring it" (R. 71; Pet. App. 12). Granting of the writ would also seem inappropriate as premature, since the case has merely been reinstated for trial.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

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OCTOBER TERM, 1954.

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RAY BRENNAN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF.

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REPLY BRIEF.

The Government contends that petitioner's testimony is not within the purpose of § 3486 because it was not involuntary.[1] Our reply is that the statute was clearly intended to cover voluntary testimony, as is shown by its legislative history as well as its language.

Section 3486 has always served the purpose of assisting Congress to obtain information. This purpose was accomplished in one way by the original form of the stat-

1. Although much is made of the fact that Committee counsel refused to assure petitioner that his testimony would be privileged, we do not understand the Government to contend that any legal significance should be attached to these remarks. Petitioner does not contend that Committee counsel tricked him into testifying. (See Pet. 7.)

ute enacted in 1857 (11 Stat. 155), and in a different way after its amendment in 1862 (12 Stat. 233). As originally drafted in 1857, the statute authorized a committee to compel a witness, who was already testifying before the committee,[2] to give self-incriminating testimony by granting him a complete immunity from prosecution. The Government's quotation from the *Bryan* opinion[3] refers to this intent of Congress in 1857; *Bryan* does not advert to the purpose of the 1862 amendment because the significance of that change was not relevant to the problem presented in that case, although it is directly relevant here.

The specific purpose of the 1862 amendment was to make it impossible for witnesses to obtain what amounted to a legislative pardon by volunteering testimony before congressional committees. The fact that the statute applied to voluntary testimony, and that volunteers had actually been able to obtain such pardons, was brought to the attention of Congress in 1862. The amendment was adopted to remedy this obvious defect in the statute.

The defect could have been corrected either by making the statute inapplicable to voluntary testimony, or by removing the provision for immunity from prosecution and merely providing that the witness's testimony, whether voluntary or involuntary, would be inadmissible in subsequent proceedings against him. Congress deliberately selected the second alternative. The legislative intent was clearly explained by Congressman Wilson, who reported the bill for the Committee on the Judiciary, and

2. Section 2 of the 1857 statute, which is the predecessor of § 3486, did not deal with the problem of compelling witnesses, by subpoena or otherwise, to appear before the committee. Section 1 (now 2 U. S. C. § 192) which did deal with that problem, has been expressly held applicable to voluntary testimony. *Sinclair* v. *United States*, 279 U. S. 263, 291 (1929).

3. *United States* v. *Bryan*, 339 U. S. 323, 335-338; See Gov. Br. 7-8.

was in charge of the 1862 amendment on the floor of the House; he expressly recognized that the statute applied to voluntary testimony.[4]

Thus from 1857 until 1862 the terms of § 3486 were broad enough to enable committees to compel witnesses to give self-incriminating testimony. In view of the 1862 amendment, subsequently its whole object and usefulness has been to encourage witnesses to testify voluntarily by making their testimony privileged, and thus relieving them of risks which might otherwise induce them to remain silent. The statute has always served the significant and "obvious purpose of facilitating disclosure."[5]

---

4. "Now, the intention of this bill is merely to do away with that portion of the second section of the act of 1857 which has operated as a general pardon concerning all offenses in relation to which a witness before a congressional committee may have been called to testify, *or in relation to which a witness presenting himself voluntarily before a committee may have been permitted to testify*. Under the second section of this act of 1857, the defendants in the cases of the Government against Russell and Floyd were discharged from all liability concerning the embezzlement of the Indian trust bonds, and all other witnesses who may testify concerning any act, no matter how criminal, before an investigating committee of Congress, are discharged in like manner. It is for the purpose of remedying this evil that this amendment of the law is proposed.

"I may say, further, that I understand that almost every day persons are offering to testify before the investigating committees of the House in order to bring themselves within the pardoning power of the act of 1857, *and it is to prevent any more such cases of pardon* that we ask the House to pass this bill." (Emphasis supplied.) *Cong. Globe*, 37th Cong., 2d Sess., 364, Jan. 17, 1862.)

5. Mr. Justice Jackson concurring in *Adams* v. *Maryland*, 347 U. S. 179, at 184. The following statement from the same opinion is also directly in point.

"I do not think it important whether petitioner was a 'voluntary' or 'involuntary' witness before the congressional Committee or whether he raised the question of his immunity under the Fifth Amendment. No such qualification appears in the Act. The whole object and usefulness of the statute is to relieve the witness of the risks which might induce him to withhold testimony from Congress. It is very customary for one who is asked for in-

Petitioner's testimony falls squarely within the purpose of the statute. His cooperation facilitated disclosure of the precise information which the Committee was seeking. He was in no sense a volunteer seeking to obtain a legislative pardon. His testimony created no privilege or immunity that he could not have obtained by remaining silent. Indeed, he volunteered nothing, but merely answered the questions which were put to him by Committee counsel. Since he made the journey from Chicago to Washington at the request of the Committee, it is not correct to say that petitioner "insisted on testifying" (Gov. Br. 7) or to imply that he was a "volunteer" as that term is used in *Adams* v. *Maryland*, 347 U. S. 179, 181 (1954).

When tested by the purpose of § 3486, particularly in the light of the primary function of legislative committees, the cases cited by the Government are either beside the point or else affirmatively support the petition. The issue involved in *Christoffel* v. *United States*,[6] was the construction of the words "competent tribunal" in the statute defining the crime of perjury. Since obtaining perjury convictions is at most an ancillary function of a legislative committee, the strict construction of that criminal statute is obviously not pertinent to the present issue. On the other hand, *United States* v. *Bryan*[7] and *Adams* v. *Maryland*,[8] which do involve 18 U. S. C. § 3486, both demonstrate that the statute must be given a reasonable construction in accord with its basic purpose. Even if it were necessary, as it was in *Bryan*, to make a departure

formation to appear before a committee without requiring the formality of a subpoena. The act does not strip one of its protection because he may be a cooperative, or even interested, witness; indeed, its purpose is to protect and thereby encourage cooperation instead of hesitation or resistance."

6. 338 U. S. 84 (1949).
7. 339 U. S. 323 (1950).
8. 347 U. S. 179 (1954).

from the literal language of the statute, these cases would support the construction of the words "before any committee" which will best facilitate the disclosure of information to Congress.

Testimony which, as the trial court found, was given before authorized representatives of the Senate Committee, sitting for the purpose of taking oral testimony from witnesses pertaining to the subject matter which the Committee was created by the Senate to explore, and which were transcribed by a court reporter for the use of the Committee, should certainly be considered testimony "before any committee" within the plain meaning of the Act. The construction of these words adopted by the trial court gives proper effect to both the language and the purpose of the statute.

Conclusion.

Petitioner should not be required to stand trial when the outcome of the litigation can be finally determined by resolving the question here presented. In view of the public importance of the novel issue which is squarely raised by the record, its prompt disposition by this Honorable Court is merited.

Respectfully submitted,

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